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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of The United States

JANUARY TERM, 1973

No. 72-1132

ALMA C. JACOBS, ADMINISTRATRIX
OF THE ESTATE OF
REGINALD GENE JACOBS, DECEASED
Petitioner

vs

WINSTON FRANKLIN CLARKE-WHITE
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE FRANKLIN COUNTY COURT OF APPEALS

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IN THE

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No._____

ALMA C. JACOBS, ADMINISTRATRIX
OF THE ESTATE OF
REGINALD GENE JACOBS, DECEASED
Petitioner

vs

WINSTON FRANKLIN CLARKE-WHITE
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE FRANKLIN COUNTY COURT OF APPEALS

The petitioner, Alma C. Jacobs, Administratrix, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Franklin County (Ohio) Court of Appeals, entered in this proceeding on July 11, 1972.

OPINION BELOW

The opinion of the Franklin County Court of Appeals appears in the appendix hereto. No opinion was rendered by the Supreme Court of Ohio, which denied petitioners application for assumption of jurisdiction on November 24, 1972.

JURISDICTION

The judgment of the Supreme Court of Ohio, refusing petitioners appeal was entered November 24, 1972, and this petition for certiorari was filed within 90 days of that date.

This court's jurisdiction is invoked under 28 USC 1257.

QUESTIONS PRESENTED

Whether the equal protection clause of the Fourteenth Amendment to the United States Constitution which provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws" gives to an illegitimate child the right to pursue an action for the wrongful death of its father as one of the father's next of kin. *U. S. Constitution, Amendment XIV, Section 1.*

STATEMENT OF THE CASE

Action was brought in the Court of Common Pleas of Franklin County by the Plaintiff in behalf of the next of kin of her decedent, including the decedent's mother, father and illegitimate child, based on the wrongful death of her decedent.

The trial court ruled in advance of trial that no evidence would be admitted relating to the child as a possible beneficiary in the case.

The jury rendered a verdict for the defendant. Appellant's motion for new trial and judgment notwithstanding the verdict were overruled.

Appeal was perfected to the Court of Appeals of Franklin County, Ohio, which sustained the trial court's decision to refuse evidence relating to the illegitimate child.

A memorandum in support of jurisdiction was filed

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with the Supreme Court of the State of Ohio, but a hearing was refused by that Court. Records of the case are in the custody of the Franklin County Court of Appeals to whom a writ of certiorari is requested.

REASONS FOR GRANTING A WRIT

1. The Ohio Court has failed to follow the precedents set by the United States Supreme Court.

The Franklin County Court of Appeals in sustaining the trial court held that the trial court was bound by the principle of *stare decisis,* and used as its basis the Ohio 1952 *Bonewit vs. Weber* decision (95 Ohio App. 428) which held that no recovery could be had in a wrongful death action for a child born out of wedlock after the death of the reputed father.

The Ohio Supreme Court dismissed an appeal in the *Bonewit vs. Weber* case, 158 Ohio St. 507, "for the reason that no debatable constitutional question is involved."

Since the *Bonewit vs. Weber* case, the United States Supreme Court, in *Levy vs. Louisiana* (391 U. S. 68) on May 20, 1968, "held that since the illegitimacy of their birth had no rational relation to the nature of the wrong allegedly inflicted on their mother decedent by the defendants and since it was invidious to discriminate against the children where no action conduct or demeanor of theirs was possibly relevant to the harm that was done their mother, the equal protection clause of the Fourteenth Amendment was violated by denying them the right to maintain an action for their mother's wrongful death." (Quotation from *Recovery for Wrongful Death, Stuart M. Speiser*).

This view was admitted to be correct as to the mother of an illegitimate child by the lower court and by trial

counsel but denied to be applicable to the father of an illegitimate child.

A 1969 New Jersey case (*Schmoll vs. Creecy,* 54 N.J. 194, 254 A 2nd 525, 38 ALR 3rd 605) considered the exact question presented here. This decision rejected the contention that the Levy case (supra) dealt only with the relation of the mother and child and was not applicable to a father-child relationship. The court stated that although the majority opinion in Levy referred only to the mother and her child, the underlying principle must be that when children suffer tortious injury by the wrongful death of a parent, their legitimacy is irrelevant to the tort feasor's liability, making it invidious to grant a remedy to the legitimate and withhold it from the illegitimate child; consequently, the court stated, it can be of no logical moment whether that parent was the mother or the father.

In Re Estate of Ortiz (1969) 60 Misc 2d 756, 303 NYS 2d 806, infra Sec. 5 (a), the court held unconstitutional a statute which permitted recovery by an illegitimate child for his mother's tortious death but not for his father's. The court noted that in view of the Levy decision, the only question open to it was whether there were other legislative purposes present in the father-child relationship which are not present in the mother-child relationship which would justify the classification and pass the test of the constitutional equal protection clause. The court agreed with the New Jersey Supreme Court in *Schmoll vs. Creecy* (1969) 54 NJ 194, 254 A2d 525, 38 ALR 3d 604, that no rational legislative purpose justifies discrimination in the wrongful death statutes in either the child-mother or the child-father relationship.

Most decisions announced since the May 20, 1968

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Levy Decision (391 US 68) have limited themselves to particular statutory rights of illegitimate children (38 ALR 3rd, page 619). In the case of *Baston vs. Sears* 15 Ohio St. 2nd 166 (1968), it was held by a 4-3 decision that in a situation where an illegitimate child sought support from his father, there was no common law right to such support and that an unreasoned assertion of violation of the Fourteenth Amendment to the U. S. Constitution was not applicable. No reference to the Levy decision is made in this majority decision on the support question. This case was decided July 10, 1968, soon after the Levy decision.

However, the minority opinion in the Baston case (15 OS 2nd 166) written by Judge C. William O'Neill, considers the Levy decision (391 U. S. 68) not mentioned in the majority decision and states:

> "The United States Supreme Court, in a decision announced May 20, 1968, *Levy vs. Louisiana,* 391 U. S. 68, 88 S Ct. 1509, 20 L. Ed 2d 436, held that the equal protection clause precluded the state of Louisiana from making a classification of children based upon legitimacy, which allowed legitimate children to recover in a wrongful death action for the loss of their mother, but denied the same right to illegitimate children.
>
> The United States Supreme Court said: "We start from the premise that illegitimate children are not 'nonpersons.' They are humans, live and have their being. They are clearly 'persons' within the meaning of the equal protection clause of the Fourteenth Amendment.
>
> "While a state has broad power when it comes to making classifications (*Ferguson v. Skrupa,* 372 U. S. 726, 732, 83 S. Ct. 1028, 1032, 10 L. Ed. 2d 93), it may not draw a line which constitutes an invidious discrimination against a particular class. See *Skinner v. State of Oklahoma,* 316 U. S. 535, 541-542,

62 S. Ct. 1110, 1113-1114, 86 L. Ed. 1655. Though the test has been variously stated, the end result is whether the line drawn is a rational one.
See *Morey v. Doud*, 354 U. S. 457, 465-466, 77 S. Ct. 1344, 1349-1351, 1 L. Ed. 2d 1485. * * * *
" * * * * Why should the illegitimate child be denied rights merely because of his birth out of wedlock? He certainly is subject to all the responsibilities of a citizen, including the payment of taxes and conscription under the Selective Service Act. How under our constitutional regime can he be denied correlative rights which other citizens enjoy?
" * * *

"We conclude that it is invidious to discriminate against them * * *."

Paul M. Herbert and Schneider, JJ., concur in the foregoing dissenting opinion.

As stated in ALR (38 ALR 3d, page 618), "It is easily foreseeable that claims for equal treatment of illegitimates under the law will now be made in areas in which they have traditionally been at a disadvantage. Thus, future litigation, or remedial legislation, may answer such questions as whether illegitimates are to be given the same rights as other surviving children under workmen's compensation acts, under insurance policies or laws, under wills, trusts, deeds and other conveyances, and under homestead acts."

The Ohio Supreme Court has not addressed itself to the question of the right of an illegitimate child to recover from the wrongful death of its father. There is a strong indication in the Baston case (*Bason vs. Sears*, 150 S 2nd 166) that the court would support the emerging majority view that it is invidious, as well as unconstitutional to discriminate against an illegitimate child.

We contend that the trial judges' exclusion of any

reference to an illegitimate child and the exclusion of evidence as to pecuniary loss of such child was improper, was an erroneous denial of the illegitimate child's constitutional rights, prejudicial to plaintiff-appellant's cause.

CONCLUSION AS TO JURISDICTION

It is respectfully submitted that this court should accept jurisdiction and issue the writ of certiorari in this case because of the substantial constitution question under the "equal protection" clause of the XIVth Amendment to the U. S. Constitution.

The precedents cited above have shown that illegitimate children are no longer to be considered "non-persons" but must be accorded the rights and privileges granted to all citizens by the Constitution.

This cause presents a question of public and great general interest since it would affect the status of illegitimate children generally. Our society should not penalize these children because of the acts and omissions of their parents.

Respectfully submitted,

JAMES R. BURCHFIELD
BURCHFIELD, SMITH & NELSON
1313 East Broad Street
Columbus, Ohio 43205
Telephone: 252-1131
Attorneys for the Petitioner

CERTIFICATE OF SERVICE

The undersigned attorney for the Petitioner, Alma C. Jacobs, Administratrix of the Estate of Reginald Gene Jacobs, deceased, hereby certifies that a copy of the foregoing Petition for a Writ of Certiorari was served upon the Attorney for the Respondent by sending a copy thereof by U. S. Mail, postage paid, to James L. Graham, 50 East Gay Street, Columbus, Ohio, on February 16, 1973.

JAMES R. BURCHFIELD
Attorney for the Petitioner

APPENDIX A
IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 72AP-79

ALMA C. JACOBS,
ADMINISTRATRIX OF THE ESTATE OF
REGINALD GENE JACOBS, DECEASED,
Plaintiff-Appellant,

v.

WINSTON FRANKLIN CLARKE-WHITE,
U. S. A. F. MEDICAL CENTER
WRIGHT-PATTERSON AIR FORCE BASE,
DAYTON, OHIO,
Defendant-Appellee.

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the decision of this court rendered herein on July 11, 1972, the assignments of error are overruled, and it is the judgment and order

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of this court that the judgment of the Common Pleas Court of Franklin County, Ohio, is affirmed.

Judges

cc: James R. Burchfield
James L. Graham and
Hubert C. Dutro, Jr.

APPENDIX B
IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO
No. 72AP-79

ALMA C. JACOBS,
ADMINISTRATRIX OF THE ESTATE OF
REGINALD GENE JACOBS, DECEASED,
Plaintiff-Appellant,

vs.

WINSTON FRANKLIN CLARKE-WHITE,
U. S. A. F. MEDICAL CENTER,
WRIGHT-PATTERSON AIR FORCE BASE,
DAYTON, OHIO,
Defendant-Appellee.

NOTICE OF APPEAL

Notice is hereby given that Alma C. Jacobs, Administratrix of the Estate of Reginald Gene Jacobs, deceased, the plaintiff, hereby appeals to the Ohio Supreme Court from the Journal Entry of Judgment entered in this action on the 27th day of July, 1972.

Plaintiff states that this case involves substantial constitutional questions.

BURCHFIELD, SMITH & NELSON
By ROBERT H. SMITH
Attorney for the Plaintiff
1313 East Broad Street
Columbus, Ohio 43205
252-1131

CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal was forwarded to James L. Graham, Graham and Dutro, attorneys for the defendant herein, at 50 West Gay Street, Columbus, Ohio, August 18, 1972 by regular mail.

ROBERT H. SMITH
Attorney for Plaintiff-Appellant

APPENDIX C
IN THE COURT OF APPEALS,
FIFTH APPELATE DISTRICT OF OHIO
No. 72AP-79

ALMA JACOBS, ADMINISTRATRIX,
Plaintiff-Appellant,

vs.

WINSTON FRANKLIN CLARKE-WHITE,
Defendant-Appellee.

ASSIGNMENTS OF ERROR

Appellant says that there was error prejudicial to this appellant in the judgment final order and proceedings of the lower court, in the following respects:

1. That the trial court erred in excluding from the

evidence any reference to the illegitimate child of plaintiff's decedent.

2. That the counsel for defendant improperly introduced evidence that Plaintiff's decedent had a girl friend who was pregnant at the time of decedent's death.

3. That the trial court erred in overruling plaintiff's motion for a directed verdict.

4. That the verdict and judgment is contrary to law and against the weight of the evidence.

Respectfully submitted,
BURCHFIELD, SMITH & NELSON
By _____
Attorneys for Plaintiff-Appellant
1313 East Broad Street
Columbus, Ohio 43205

APPENDIX D

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 72AP-79

ALMA C. JACOBS,
ADMINISTRATRIX OF THE ESTATE OF
REGINALD GENE JACOBS, DECEASED,
Plaintiff-Appellant,

v.

WINSTON FRANKLIN CLARKE-WHITE,
U. S. A. F. MEDICAL CENTER,
WRIGHT-PATTERSON AIR FORCE BASE,
DAYTON, OHIO,
Defendant-Appellee.

DECISION

Rendered on July 11, 1972

BURCHFIELD, SMITH & NELSON,
MR. JAMES R. BURCHFIELD,
1313 East Broad Street,
Columbus, Ohio 43205,
For Plaintiff-Appellant.
GRAHAM & DUTRO,
MR. JAMES L. GRAHAM &
MR. HUBERT C. DUTRO, JR.,
50 West Gay Street,
Columbus, Ohio,
For Defendant-Appellee.

REILLY, J.

This is an appeal from a judgment of the Common Pleas Court entered February 10, 1972. It is a wrongful death action filed by appellant, administratrix of the estate of Reginald Jacobs, against appellee, Winston Franklin Clarke-White.

The case involves an auto accident which happened September 28, 1969, at the intersection of Parsons Avenue and Bryden Road, in Columbus, Ohio. Appellant's decedent was driving west on Bryden Road, and appellee north on Parsons Avenue, when the accident occurred. The primary issue in the trial was the color of the traffic light at the intersection just before the collision.

The jury rendered a verdict for the defendant. Appellant's motions for new trial and judgment notwithstanding the verdict was overruled. Whereupon, appellant perfected this appeal.

Appellant advances four assignments of error. The first is the following:

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> "That the trial court erred in excluding from the evidence any reference to the illegitimate child of plaintiff's decedent."

The court, prior to trial, considered the question of whether the decedent's alleged illegitimate child, born after his death, was a proper beneficiary in a wrongful death action. (R-4-6.) Whereupon, the court applied the rule in *Bonewit v. Weber* (1952), 95 Ohio App. 428, to wit:

> "Section 10509-167, General Code, which provides that a recovery in an action for wrongful death 'shall be for the exclusive benefit of the surviving spouse, the children and other next of kin of the decedent,' does not contemplate a recovery for a child born out of wedlock after the death of the reputed father. Such child does not fall within the classes named in the statute."

Appellant also raised a constitutional issue. We note, however, that subsequent to the above decision, the Supreme Court dismissed the appeal in *Bonewit v. Weber,* 158 Ohio St. 507, with the following statement:

> "It is ordered and adjudged that this appeal as of right be, and the same hereby is, dismissed for the reason that no debatable constitutional question is involved."

The trial court ruled that no evidence would be admitted relating to the child as a possible beneficiary in the case. This was not error. The court was bound by the principle of *stare decisis.* This concept has two aspects: that a court will follow previously announced principles of law within its jurisdiction in the absence of extreme circumstances; and that a court is bound by and must follow decisions of a reviewing court which have decided the issue involved. Any other course disregards the doctrine of a government of laws rather than men. The issue of such liability in a wrongful death

action could, of course, be determined by the Legislature. Therefore, appellant's first assignment of error is overruled.

Appellant's second assignment of error is the following:

> "That the counsel for defendant improperly introduced evidence that Plaintiff's decedent had a girl friend who was pregnant at the time of decedent's death."

The court excluded any reference to the illegitimate child as a possible beneficiary in a wrongful death action. He explicitly so stated at page 5 of the record:

> "* * * the Court will so order, that so far as this proceeding is concerned any evidence with reference to said alleged illegitimate child *as a possible beneficiary in the wrongful death action will be excluded.* In so reulin [sic] the Court feels that the case of Bonwit vs. Webber, decided October 15, 1952, on which a subsequent appeal was dismissed by the Supreme Court of Ohio as not involving a constitutional question, is controlling as to this question * * *." (Emphasis added.)

The court, however, did not thereby exclude all evidence concerning this child, if relevant, in another context. Counsel for appellee raised the issue upon cross-examination as follows (R-92, 93):

> "Q. And your son was living with you when this accident happened? A. Yes.
> "Q. He planned to be married in the near future? A. Well, he said he was.
> "Q. He had been going with a girl by the name of Carletta Austin, and Carletta Austin was pregnant? A. Yes.
> "Q. After Reginald's decease, I assume his mail would continue to come to your residence? A. Yes.
> "Q. And did you receive a Draft Induction Notice sometime shortly after his decease? A. Yes, I did.
> "Q. Now, Reginald gave you money from time to

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time? A. He gave it to me any time I wanted it or needed it. I always looked for one-fourth of his money, anyway.

"Q. He basically after he left school and started working was paying you for room and board? A. I guess you could call it that, but whenever I wanted money he would give it to be.

"Q. That was what it was for? A. I didn't say room or board, or nothing. He just gave it to me for what I needed and that's what I used it for.

"Q. Referring again to your deposition. 'This money Reginald gave to you was in the nature of payment of room and board?' Your answer, 'Well, I guess that's what he thought it was, what he meant for it to be.' A. Yes, but it was for whatever I wanted to use it for.

"Q. Did Reginald own any property at the time of his decease? A. The car.

"Q. Did he have any bank accounts? A. Well, he did have a little one he was putting money in.

"Q. But different times he would take it out? A. I guess.

"Q. As his Administratrix you have taken over that bank account? A. There wasn't nothing in it but two dollars and something, and it's still there.

"Mr. Graham: Thank you very much. That's all the questions I have.

"The Court: Further redirect?"

It is plain to see that the above testimony does not relate to the "illegitimate child as a possible beneficiary in a wrongful death action." Moreover, we note there was no objection to the testimony. Accordingly, appellant's second assignment of error is overruled.

The third and fourth assignments of error are interrelated. Therefore, they are considered together. They are respectively as follows:

"That the trial court erred in overruling plaintiff's motion for a directed verdict.

"That the verdict and judgment is contrary to law and against the weight of the evidence."

We emphasize that Rule 50 (A) (4) of the Rules of Civil Procedure reads as follows:

"(A) *Motion for directed verdict.*

"* * *

"(4) When granted on the evidence. When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."

The record reveals that appellee denied under oath that he entered the intersection against the red traffic signal (R-123), thus establishing a jury issue as to his negligence. Consequently, the trial court correctly applied the above rule. Whereupon, appellant's third assignment of error is overruled.

The issue of whether the verdict was contrary to law actually relates to the third assignment of error. The test of manifest weight of the evidence, however, is whether reasonable minds could differ as a matter of law. In brief, if reasonable minds could differ, the judgment is not against the manifest weight of the evidence. A careful review of the record in this case shows that the verdict is not against the weight of the evidence. Hence, appellant's fourth assignment of error is also overruled.

Therefore, for the foregoing reasons, the judgment of the trial court is affirmed.

TROOP, P. J., and HOLMES, J., concur.

APPENDIX E

THE SUPREME COURT OF THE STATE OF OHIO

No. 72-715

APPEAL FROM THE COURT OF APPEALS FOR FRANKLIN COUNTY

1972 TERM

To wit: November 24, 1972

THE STATE OF OHIO, CITY OF COLUMBUS.

ALMA C. JACOBS, Admx.,

Appellant,

vs.

WINSTON FRANKLIN CLARKE-WHITE,

Appellee.

This cause, here on appeal as of right from the Court of Appeals for Franklin County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Franklin County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ____ day of _____ 19 ____.

_____Clerk

_____Deputy

THE SUPREME COURT OF THE STATE OF OHIO

No. 72-715

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS FOR FRANKLIN COUNTY TO CERTIFY ITS RECORD

1972 TERM

To wit: November 24, 1972

THE STATE OF OHIO, CITY OF COLUMBUS.
ALMA C. JACOBS, Admx.,
Appellant,

vs.

WINSTON FRANKLIN CLARKE-WHITE,
Appellee.

It is ordered by the Court that this motion is overruled.
COSTS:

Motion Fee, $20.00, paid by Robert H. Smith.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ____ day of _____, 19____.

_____Clerk

_____Deputy

APPENDIX F

THE SUPREME COURT OF THE STATE OF OHIO

No. 72-715

Filed Dec. 19, 1972

ALMA C. JACOBS, ADMINISTRATRIX,
Appellant,

vs.

WINSTON FRANKLIN CLARKE-WHITE,
Appellee.

NOTICE OF APPEAL

Notice is hereby given that Alma C. Jacobs, Administratrix, the plaintiff-appellant, hereby appeals to the Supreme Court of the United States from the final decision of the Supreme Court of the State of Ohio dismissing her appeal from the Court of Appeals of Franklin County dated November 24, 1972.

BURCHFIELD, SMITH & NELSON
By JAMES R. BURCHFIELD
Attorney for the Plaintiff
1313 East Broad Street
Columbus, Ohio 43205
252-1131

CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal was forwarded to James L. Graham, Graham and Dutro, Attorneys for the defendant herein, at 50 West Gay Street, Columbus, Ohio on the 19th day of December, 1972.

JAMES R. BURCHFIELD